

No. 22049

In the
United States Court of Appeals
FOR THE NINTH CIRCUIT

K-S-H PLASTICS, INC., a Missouri corporation,
Appellant,
vs.

CAROLITE, INC., a California corporation, and
J. W. CARROLL & SONS, a California corporation,
Appellees.

APPELLANT'S OPENING BRIEF

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APPELLANT'S OPENING BRIEF

**STATEMENT OF PLEADINGS AND
JURISDICTIONAL FACTS**

A. Statement of the Pleadings

Plaintiff, K-S-H Plastics, Inc. (hereinafter referred to as "plaintiff") filed an action against defendant, Carolite, Inc. (hereinafter referred to as "Carolite") for infringement of the registered trademark K-LITE and for unfair competition by infringement of the common law trademarks, K-4, K-5, K-11 and K-12 and contributory palming off. The complaint alleged jurisdiction based upon 28 U.S.C. 1338, and upon diversity of citizenship and 28

U.S.C. 1332. Thereafter, upon order of the court (Vol. II, R. 2)* an amended complaint (Vol. II, R. 4) was filed alleging the same facts with respect to an additional defendant, J. W. Carroll & Sons (hereinafter referred to as "Carolite").

The amended complaint alleged that plaintiff manufactures and sells plastic lighting panels used in fluorescent lighting fixtures and uses the term K-LITE in connection with the sale of such lighting panels. Carolite also manufactures and sells plastic lighting panels and uses the term CAROLITE in connection therewith.

The amended complaint further alleged that plaintiff's lighting panels are embossed with different prismatic pattern configurations and that the terms K-4, K-5, K-11 and K-12 are used in connection with panels bearing four different patterns. Carolite makes and sells lighting panels having pattern configurations identical to those on plaintiff's panels and uses the symbols C-4, C-55, C-11 and C-12 in connection therewith.

The amended complaint further alleged that Carolite, unlike plaintiff, did not mark its identical lighting panels with any mark, symbol or term to identify the manufacturer and that Carolite thereby enabled and abetted others in palming off Carolite panels upon unsuspecting purchasers who demanded plaintiff's lighting panels.

Finally the amended complaint alleged that Carolite adopted a similar catalog to that used by plaintiff and

* The Record comprises ten volumes, volumes three through ten containing the testimony at the trial. References to volume two are identified as "Vol. II, R." Volume I is the record in the *Sunbeam* case. The remaining volumes with consecutive pagination are identified only by page reference numeral, thus "R."

employed other acts as part of an intentional predatory plan to appropriate plaintiff's good will.

Carolite answered admitting use of the term CAROLITE but denying infringement; denying that plaintiff had any exclusive right to use the terms K-4, K-5, K-11 and K-12; admitting that it made and sold lighting panels having patterns similar to those of plaintiff; denying that the symbols C-4, C-55, C-11 and C-12 will cause or are likely to cause confusion; and denying any plan to appropriate plaintiff's good will. (Vol. II, R. 13) Affirmative defenses were also raised by Carolite and counterclaims for declaratory judgment and trade libel and disparagement were filed.

The Findings of Fact and Conclusions of Law adopted by the Court below were prepared by counsel for Carolite after the Court refused the proposed Findings of Fact and Conclusions of Law submitted by Plaintiff.

B. Jurisdiction of the District Court and of the Court of Appeals for the Ninth Circuit

1. Jurisdiction of the District Court

Jurisdiction was based upon Section 1121 of Title 15 and Section 1338 of Title 28 of the United States Code. The lower court found that it had jurisdiction over the parties and the subject matter. (Vol. II, R. 46)

2. Jurisdiction of the Court of Appeals

Judgment was entered for plaintiff in part and in part for Carolite on May 4, 1967 (Vol. II, R. 48) Jurisdiction on appeal is based upon Section 1291 of Title 28 of the United States Code and upon plaintiff's notice of appeal filed on May 31, 1967. (Vol. II, R. 50)

STATEMENT OF THE CASE

A. Summary of the Facts

1. Plaintiff's Business and Products

K-S-H Plastics, Inc. began to manufacture plastic lighting panels in 1958 and has continued to make and sell such panels throughout the United States for the last eight years. (Finding of Fact No. 4, Vol. II, R. 40) In May, 1958 plaintiff produced an extruded plastic prismatic lighting panel having a pyramidal pattern embossed thereon and identified as K-4. (Finding of Fact No. 13, Vol. II, R. 42) Prior to this time plaintiff had produced other prismatic lighting panels having different patterns embossed thereon and identified with the symbols K-2 and K-3. (Plf. Ex. 6) At the time the K-4 panel was introduced, plaintiff began to use the trademark K-LITE and this mark was registered in the United States Patent Office on November 10, 1959 bearing Registration No. 687,973, which registration is in full force and effect. (Finding of Fact No. 10, Vol. II, R. 41)

In March, 1959 plaintiff introduced a panel having a hexagonal embossed pattern and identified this panel with the mark K-5. Plaintiff continued to expand its product line of plastic prismatic lighting panels by the introduction of a new and distinctive egg-crate (louver) pattern in January, 1963 identified with the trade symbol K-11. (Finding of Fact No. 13, Vol. II, R. 42) The pattern embossed on the K-11 panel was designed and originated by Mr. Stahlhut, the senior vice-president of K-S-H Plastics, Inc. Thereafter, Mr. Stahlhut originated another unique diamond pattern embossed on a prismatic panel which was brought on the market by plaintiff in

October, 1963 and identified as K-12. (Finding of Fact No. 13, Vol. II, R. 42) Each of the patterns were engineered to give precision lighting panels having certain lighting characteristics.

During this period of time other lighting panel patterns were devised by K-S-H Plastics Inc. but for various reasons were never introduced on the market. (R. 97) Moreover, in early 1963, plaintiff began to direct its marketing efforts towards architects and lighting engineers and for this purpose identified its superior quality panels with the trademark K-LITE and relegated panels having other patterns to a second line of products. (R. 88 and 97) Consequently, although plaintiff generally designated its panels with consecutive alphanumeric designations, those panels which were admitted into the K-LITE line were non-consecutively numbered, the omitted numbers being included in a line called ECONO-LITE. (R. 97) Furthermore, some of the earlier lighting panels, such as K-2 and K-3, were obsoleted and were thus dropped from the K-LITE line. (R. 90)

In introducing the K-5 lighting panel, plaintiff began to procure its embossing rolls from Roehlen Engraving Works located in Rochester, New York. (R. 115) To obtain these embossing rolls, plaintiff submitted engineering drawings describing the patterns and providing for the necessary tolerances and other technical information required to engrave an extrusion pattern roll. Since that time plaintiff has continued to submit its original pattern designs to this engraver for the preparation of embossing rolls, although it has obtained embossing rolls from other engravers. (R. 115)

Anticipating the introduction of a new catalog to be used in marketing plaintiff's K-LITE lighting panels, plaintiff began to obtain lighting panel tests in the form

of photometric reports from an independent testing laboratory in September, 1962. (R. 94; Plf. Ex. 4) These tests were conducted by Independent Testing Laboratories, Inc. (ITL) located in Denver, Colorado (R. 94) Subsequently, plaintiff has continued to use this testing laboratory for all of the photometric testing conducted on the various new prismatic lighting patterns it has introduced. (Plf. Ex. 4)

These test results in the form of separate pages were incorporated into a new catalog which plaintiff began to distribute in early 1963. (R. 92) This catalog contained a description sheet for each of the different panels followed by a series of full page reproductions of ITL test reports. (Plf. Ex. 4) Since plaintiff had been, and intended to continue, introducing new prismatic lighting panels on the market, the new catalog comprised a three-ring loose leaf notebook. (Plf. Ex. 3) While such notebooks, of course, were in common usage, they had not previously been used by extruded plastic lighting panel manufacturers and the form of the catalog was consequently distinctive. Prominently displayed throughout plaintiff's catalog were the trade symbols it used to identify its various lighting panels having different embossed patterns making up the K-LITE line. (Plf. Ex. 3) The complete K-LITE line, as illustrated in plaintiff's catalog, presently includes the K-4, K-5, K-11, K-12, K-33 and K-44 lighting panels. (Plf. Ex. 4) The latter lighting panels are identified with the trade symbols K-33 and K-44 even though they have the *same* pattern embossed thereon as the K-12 panel. Furthermore, colored lighting panels having the same pattern, are also designated by the term Hobnail. (R. 1152-53 and 1155; Plf. Exs. 184 and 185) And the lighting panel designated K-88 has *no* pattern embossed thereon. (R. 1155; Plf. Ex. 10)

A new concept in lighting panels was introduced by plaintiff in December, 1964. To cope with the industry problem of preventing discoloration of the plastic panels, plaintiff began to coat its panels with "Tedlar", a polyvinyl film manufactured and commercially sold by E. I. duPont de Nemours & Company. (R. 1172-73; Plf. Ex. 4) The advantages of Tedlar coated lighting panels were extolled by plaintiff in its magazine and catalog advertising. (Plf. Exs. 3, 14 and 15)

Plaintiff has spent considerable sums of money for advertising and sales promotion of its plastic prismatic lighting panels. (R. 99) Plaintiff's representatives have carried on sales promotion by personal contact with architects and lighting engineers. (R. 119) These customer calls serve to acquaint these persons with the performance characteristics and manufacturing quality of plaintiff's lighting panels and to convince these persons to specify plaintiff's products. (R. 119) In order to maintain a reputation for quality lighting panels which require premium materials and precision manufacturing techniques, plaintiff has engaged in materials research to determine the best quality of raw materials. It has also established a production research group in 1961 and has continually expanded to assure that quality control standards are maintained. (R. 110-14; Plf. Ex. 4)

2. Carolite's Business and Products

Defendants, J. W. Carroll & Sons and Carolite, Inc., are manufacturers of plastic lighting panels and are in direct competition with plaintiff. J. W. Carroll & Sons had been engaged in the manufacture of shaped lighting panels for a number of years and in September, 1962 took steps to enter the field of flat prismatic lighting panels. At this time, defendant J. W. Carroll & Sons contacted Roehlen Engraving Works in Rochester, New York and

submitted a sample portion of a lighting panel and requested an embossing roll for producing a panel having a pattern similar to the pattern on plaintiff's K-5 lighting panel. (R. 391; Plf. Ex. 5) Since Roehlen Engraving Works had prepared the tooling for engraving a roll having a hexagonal pattern, it was able to comply with the request of J. W. Carroll & Sons and in fact the roll was engraved from the engraving tool paid for by K-S-H Plastics, Inc. (R. 395) J. W. Carroll & Sons began production of lighting panels having this hexagonal pattern in April, 1963 and designated the panel as C-55. (Finding of Fact No. 14, Vol. II, R. 42-43) Shortly thereafter, defendant, J. W. Carroll & Sons, approached Independent Testing Laboratory, Inc. and had this laboratory prepare photometric tests for this lighting panel which were submitted on test reports having the same format as those received earlier by K-S-H Plastics, Inc. (R. 405; Plf. Ex. 73) and to aid in development of their products.

In January, 1964 J. W. Carroll & Sons introduced a second lighting panel having an egg crate pattern identical to that previously manufactured and sold by plaintiff and no one else) and designated this panel C-11. (Finding of Fact No. 14, Vol. II, R. 42-43) A panel having a diamond pattern identical to the lighting panel sold by K-S-H under the mark K-12 was introduced by defendant J. W. Carroll & Sons in June, 1964 and designated C-12. (Finding of Fact No. 14, Vol. II, R. 42-43)

The principals of the J. W. Carroll & Sons company formed the defendant, Carolite, Inc., in August, 1964 which thereafter introduced a lighting panel having a pyramidal pattern and identified such panel with the symbol C-4. This panel has a pattern identical to the pattern on the K-4 panel introduced by plaintiff in 1958. (Finding of Fact No. 14, Vol. II, R. 42-43)

In connection with the sale of its flat prismatic lighting panels, J. W. Carroll & Sons began to use the trademark Carolite in April, 1963. (Finding of Fact No. 11, Vol. II, R. 41)

The embossing rolls for the four lighting panel patterns manufactured by Carolite have been obtained from Roehlen Engraving Works and of course each was introduced on the market subsequent to plaintiff's manufacture and sale thereof.

In marketing its line of prismatic lighting panels, Carolite began using a three-ring loose leaf notebook in which was contained a specification sheet for each lighting panel pattern followed by a series of test reports obtained from Independent Testing Laboratory. (Plf. Ex. 73) The format for Carolite's catalog was designed by an industrial designer and Mr. Wellen, president of Carolite, Inc., while reviewing plaintiff's and other lens manufacturer catalogs. (R. 427 and 429) The lighting panels manufactured and sold by Carolite are not arranged in the catalog in accordance with their introduction on the market but are arranged identical to that of plaintiff's catalog. (Plf. Ex. 73) Furthermore, Carolite was manufacturing and selling its lighting panels for many months prior to reviewing its advertising and promotional material as well as the test reports.

Subsequent to plaintiff's introduction of Tedlar coated panels on the market, Carolite began to advertise that such panels were immediately available. In fact, however, it was three months thereafter before Carolite had the capability of providing such panels and the first sale was seven months thereafter. (Plf. Ex. 102; R. 459 and 461)

3. Palming Off By Carolite

The question of whether Carolite was guilty of unfair competition by palming off involved two types of specifications (i.e., requests for lighting panels): (1) some specifications designated plaintiff's lighting panels with one of plaintiff's trade symbols, K-S-H or K-LITE, in conjunction with one of the trade symbols K-4, K-5, K-11 or K-12; and (2) other specifications designated the lighting panels with one of the trade symbols K-4, K-5, K-11, or K-12 alone.

As to the first type of specification, the court found that the use of K-S-H or K-LITE was a specific demand for lighting panels manufactured only by plaintiff. Finding of Fact No. 16, Vol. II, R. 44) Plaintiff proved that on at least one construction job involving this type of specification, referred to as the Lincoln Hospital Job, Sunbeam substituted lighting panels aided by Carolite without obtaining approval, and therefore palmed off such panels on the customer. (Conclusion of Law VI, Vol. II, R. 46) To obviate further discovery, it was agreed that other instances of such palming off need not be proved by plaintiff, since this one instance would support plaintiff's requested injunctive relief.

An appropriate judgment order, enjoining both Sunbeam and Carolite from palming off Carolite panels where the panel designations included the terms K-S-H or K-LITE, was entered. (Vol. II, R. 48-49)

As to the second type of specification, where the panel was designated by one of the symbols K-4, K-5, K-11 or K-12 alone, plaintiff had the burden of proving: (1) that the use of such trade symbols was a demand for plaintiff's lighting panel; and (2) that defendant substituted other panels when customers requested panels by the use of these trade symbols. The facts relating to the first point

are discussed in plaintiff's brief in co-pending Appeal No. 22049A.

With respect to the second point, plaintiff established several instances in which Carolite shipped lighting panels to the job site (rather than to the lighting fixture manufacturer) and intentionally concealed the source of manufacture by covering over its name printed on the boxes in which the panels were shipped. (Plf. Ex. 132 and 132A; R. 405 and 558-61) Generally, lighting panels are shipped to the fixture manufacturer which installs the panel in the fixture and the customer does not see the cartons in which the panels are shipped by the panel manufacturer. Carolite, however, unlike plaintiff, does not mark its panel with any type of symbol, trademark or other identification which indicates source. (R. 465-66) Carolite has also called the attention of fixture manufacturers to favorable price comparison. (Plf. Ex. 94 and 95)

B. Questions Involved

1. Whether the primary significance of the trade symbols K-4, K-5, K-11 and K-12 to purchasers and prospective purchasers of plastic prismatic lighting panels is only to describe the pattern configuration embossed on such panels or whether such symbols identify lighting panels manufactured by K-S-H Plastics, Inc.
2. Whether there is a likelihood of confusion created by Carolite's use of the trade symbols C-4, C-55, C-11 and C-12 in view of plaintiff's prior use of the trade symbols K-4, K-5, K-11 and K-12 on identical products sold to the same class of purchasers through the same channels of distribution.
3. Whether there is a likelihood of confusion created by Carolite's use of the term CAROLITE in view of plaintiff's prior use of the federally registered term

K-LITE on identical goods sold to the same class of purchasers through the same distribution channels.

4. Whether Carolite's adoption of the term CAROLITE, the trade symbols C-4, C-55, C-11 and C-12, a similar catalog, and use of the same testing and engraving facilities in connection with the manufacture and sale of lighting panels having patterns identical to those previously manufactured and sold by plaintiff was unfair competition.

5. Whether Carolite was guilty of unfair competition by contributory palming off through aiding and abetting fixture manufacturers in substituting its lighting panels, without approval, when plaintiff's lighting panels were specified by the trade symbols K-4, K-5, K-11 and K-12 alone.

ERRORS RELIED UPON

1. The court erred in finding that the Carolite trade symbols C-4, C-55, C-11 and C-12 are not confusingly similar to plaintiff's trade symbols K-4, K-5, K-11 and K-12 and that there is no likelihood of confusion created by Carolite's use of these trade symbols. (Finding of Fact No. 15, Vol. II, R. 43)

2. The court erred in finding that the term CAROLITE is not confusingly similar to the valid federally registered trademark K-LITE and that there is no likelihood of confusion created by Carolite's use of this term. (Finding of Fact No. 15, Vol. II, R. 43)

3. The court erred in finding that Carolite's use of C-4, C-55, C-11 and C-12 in the sale of lighting panels having patterns which are substantially identical to the panels sold by plaintiff, together with the use of the same engraver and testing laboratory and a similar catalog did

not constitute unfair competition. (Finding of Fact No. 15, Vol. II, R. 43; Conclusion of Law VII, Vol. II, R. 47)

4. The court erred in finding that the use of the trade symbols K-4, K-5, K-11 or K-12 by specifiers is not a demand for a lighting panel manufactured and sold only by plaintiff but "describes *only* the desired pattern" of a lighting panel. (Finding of Fact No. 17, Vol. II, R. 44; Conclusion of Law II, Vol. II, R. 46)

5. The court erred in concluding that use of the terms C-4, C-55, C-11 and C-12 does not infringe plaintiff's designations K-4, K-5, K-11 and K-12. (Conclusion of Law III, Vol. II, R. 46)

6. The court erred in concluding that use of the term CAROLITE does not infringe the term K-LITE. (Conclusion of Law IV, Vol. II, R. 46)

A R G U M E N T

Prior to summarizing the argument in this case, attention must first be directed to the Sunbeam case (Appeal No. 22049A) and to the trial court proceedings.

At the trial, the consolidated cases both presented the issue of the manner in which the trade used plaintiff's symbols K-4, K-5, K-11 and K-12. Resolution of this issue was determinative on whether Sunbeam was palming off, Carolite was contributorily palming off, and whether Carolite's use of the symbols C-4, C-55, C-11 and C-12 was an infringement of plaintiff's right to exclusive use of its trade symbols. At the conclusion of plaintiff's *prima facie* case, Carolite moved for involuntary dismissal and the court granted the motion as to all trademark infringement. (Finding of Fact No. 18; Vol II, R. 44) Subsequently, Sunbeam presented witnesses to show how plaintiff's trade symbols were used in the trade, but Carolite was not allowed to adduce evidence in this regard. Since Carolite counsel had prepared these witnesses, an abortive attempt was made to allow Carolite counsel to be appointed co-counsel to examine these witnesses. The witnesses were thereafter examined by Sunbeam counsel. Thus, all of the evidence on the issue of the trade usage of plaintiff's symbols was technically introduced in the Sunbeam case, though it was obviously applicable to both cases.

It is plaintiff's position, based upon the above observations, that the issue of the manner in which the symbols K-4, K-5, K-11 and K-12 are used in the trade is before this Court in both cases. It would not comport with reason to contend that the lower court found that these symbols

were not trademarks in the Sunbeam case, but that they were valid or that no opinion was expressed on the issue in the Carolite case.

Accordingly, reference is made herein to the facts on this issue appearing at pages 6 through 15 in Appellant's Brief in the Sunbeam case and the argument proceeding from page 23 to 38 therein.

Plaintiff asserts that Carolite is guilty of unfair competition by using trade symbols confusingly similar to those first used by plaintiff on *indistinguishable* products, sold to the same class of customers through identical channels of distribution, and with a clear intent to appropriate plaintiff's goodwill. Furthermore, use of the trademark CAROLITE in the manner described above infringed plaintiff's valid trademark K-LITE.

Finally, Carolite is guilty of unfair competition by aiding and abetting palming off by several fixture manufacturers, including Sunbeam.

A. Carolite Has Unfairly Competed With Plaintiff By Using Confusingly Similar Trade Symbols As Part Of A Predatory Plan To Pass Off Their Goods And Business As That Of Plaintiff

As indicated above, plaintiff has shown in the Sunbeam brief (Appeal No. 22049A) that K-4, K-5, K-11 and K-12 are capable of becoming common law trademarks and in fact have acquired such status. The conduct of Carolite will be shown to evince a predatory plan and an intention to confuse and deceive purchasers.

The primary implement in Carolite's scheme to appropriate plaintiff's good will is the adoption of trade symbols which are in themselves confusingly similar to those previously used by plaintiff. There is no question as to plaintiff's priority of use. But this trade practice, pro-

scribable alone, was only one facet of an overall plan. In addition, Carolite copied the appearance of plaintiff's products (an act which is admittedly legal *when standing alone*) to aggravate confusion, distributed simulated copies of plaintiff's catalog, and have determinedly adopted marketing practices to deceive prospective purchasers.

Each of the acts perpetrated by defendants considered in isolation could perhaps be explained as unintentional. But the detailed and minute copying of every aspect of the marketing methods used by plaintiff evince a deliberate intent to engage in fraudulent practices. The predatory plan of Carolite, comprising numerous interwoven individual acts of copying and simulation, has been recognized by the courts as unfair competition.

In *Midwest Plastics Corp. v. Protective Closures Co.*, 285 F.2d 747 (10th Cir. 1961), the defendant manufactured plastic caps which were nearly indistinguishable from those previously made and sold by plaintiff. The caps of defendant bore no marking or identification of source. Plaintiff owned the trademark "Tapered Caplugs" and the defendant used the terms "Plugcap" and "Tapercap" in connection with the sale of its goods. The defendant also distributed a trade catalog containing substantial amounts of material copied directly or in substance from plaintiff's trade literature such as illustrations and manner of data tabulation. At the time of trial, the defendant discontinued the use of such catalogs. The Court proceeded to analyze the defendant's practices not in terms of a comparison of the products, trademarks or catalogs as unrelated acts, but rather as an entire plan. The Court stated at page 750 as follows:

"The complete absence of any identifying marks on the defendant's products, except the stock numbers which tended to identify them as coming from the

appellee, coupled with the deliberate and studied copying of appellee's catalogue, including phonetically similar captions and descriptive illustrations, is entirely sufficient to justify the finding that such acts or omissions are likely to deceive and confuse purchasers as to the source of the defendants' products, and evidences a deliberate scheme to palm off their goods as those of the plaintiff."

Where a defendant has adopted plaintiff's numbers, similar catalog, sub-contracted with the same material suppliers and makes and sells products which are confusingly similar in appearance to those manufactured by plaintiff, the plaintiff's goodwill is appropriated and it is entitled to relief. *Unistrut Corporation v. Power*, 175 F. Supp. 295 (D. Mass. 1958)

Similarly, in *American Safety Table Company v. Schreiber*, 269 F.2d 255 (2d Cir. 1959), the defendant made and sold machines for use in the manufacture of shirts which were identical in every minute detail to those previously sold by the plaintiff. The Court noted that the naked copying by defendant is permissible; but that while free competition requires that the defendant be allowed to *manufacture* products which may confuse customers as to source, it does not and should not condone marketing methods which aggravate the confusion. This principle is a corollary to the rule established in *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 59 S. Ct. 109 (1938) that copying of a product places a burden upon the copier to identify its product so as to minimize confusion. In *J. C. Penney Co. v. H. D. Lee Mercantile Co.*, 120 F. 2d 949 (8th Cir. 1941) the Court expressed the rule at page 955 as follows:

"The right to imitate or copy the functional features of goods does not of course import the privilege of stealing the trade of the originator, through

deception or confusion. Defendant could not under any circumstances sell its overalls as those of plaintiff, nor could it wittingly allow the door to be left open to probable public deception or confusion as a result of its imitation."

It is apparent that since a copier has a duty to avoid any confusion which inheres in the similarity of products, then *a fortiori* he has an obligation to refrain from any marketing practices which increase confusion. Indeed, the methods of marketing adopted by Carolite must be circumspect.

The evidence adduced in the present case shows beyond peradventure that Carolite's conduct falls within the activities proscribed by the foregoing cases as unfair competition. The individual practices by Carolite will be reviewed, commencing with the most important continuing conduct, adoption of the trade symbols—C-4, C-55, C-11 and C-12.

1. The Use of C-4, C-55, C-11 and C-12 Have Confused and Deceived Purchasers Enabling Carolite to Pass Off Its Goods As Those Of Plaintiff

Carolite uses C-4, C-55, C-11 and C-12 on prismatic lighting panels having the *identical appearance* as those panels made and sold by plaintiff. There are four popular patterns embossed on the lighting panels distributed by plaintiff and Carolite. The geometric shape of the individual prisms are conveniently described as square, hexagonal, louver (or egg erate) and diamond. Plaintiff uses the marks K-4, K-5, K-11 and K-12, respectively, on these specific products; Carolite uses the marks C-4, C-55, C-11 and C-12 on the identical appearing panels. None of the panels made and sold by Carolite include any designation or symbol which identifies the manu-

facturer. Plaintiff's panels, on the other hand, bear the mark K-LITE and other identifiable information to protect the public as to quality and product integrity as set forth, for example, on each of plaintiff's catalog characteristic sheets. (Plf. Ex. 4; R. 124)

There is no question of priority of appropriation of the marks in suit. Plaintiff used its first trade symbol five years earlier than the first symbol used by defendants. (Plf. Ex. 3, Stip. Paras. 21 and 22) Plaintiff chronologically introduced lighting panels having a square, hexagonal, louvered and finally a diamond pattern identified respectively with the numerically successive symbols K-4, K-5, K-11 and K-12. Carolite introduced copies of plaintiff's lighting panel patterns in a different chronological order and used a non-successive numbering system *so that each identical pattern panel had the same numeral as that used by plaintiff.* Carolite has not copied the products or adopted the symbols, however, of any other panel manufacturer although there are many other panel manufacturers with different designs. Although Carolite began with a system having a numeral which included two digits identical to the digit in plaintiff's marks (C-55), the subsequent numerals were made identical to plaintiff's.

The lighting panels made by both parties are sold to the same class of purchasers—lighting engineers and architects as agents for building owners. The channels of trade through which the panels are *supplied* include the fixture manufacturer, electrical contractor and the building owner. The panels are first specified by lighting engineers and bids are made by lighting fixture manufacturers. After the bids are evaluated, the lighting engineers direct the electrical contractor through the general contractor to order the lighting fixtures including

the lighting panels. The purchase order is placed by the electrical contractor with an electrical distributor who orders the fixtures from the lighting fixture manufacturer which in turn purchases the panels from the panel manufacturers, such as plaintiff and Carolite. (Plf. Ex. 24)

This case primarily involves the question of confusion with respect to the lighting engineers and fixture manufacturers. There exists a likelihood of confusion when Carolite's symbols are used on the identical goods as those of plaintiff and sold to the same customers through the same distribution channels. By creating such confusion, Carolite is able to pass off its goods upon the public. The similarity of the marks is apparent since the numeral portions thereof are identical in three instances and only colorably different in one. The capital letters K and C are also similar when hand printed on an order. And it is not one mark which is similar—but four.

The evidence shows not only a likelihood of confusion but numerous instances of actual confusion. Mr. Simmons, Sunbeam's witness, testified in response to questioning by the Court, as to whether he would be confused if someone talked about a C-4 lens, that he would have "to look up and find out what the C-4 lens is". (R. 814) He explained that he would not be confused for the reason that he had previously encountered the C-4 symbol and had checked out what it meant. (R. 814)

It is of course usually true that a purchaser may "check out" a product to assure its manufacture, but this does not suggest, of course, that the purchaser will continue to recall the respective manufacturers of the products bearing the similar marks. Actual instances of confusion point out the fact the marks *do* cause confusion

from which the likelihood of deception of other purchasers may be inferred. Although Mr. Simmons had Carolite's catalog, enabling him to find out who manufactures the C-4 panel, this may not invariably be true and confusion may not be resolved.

In the distribution of lighting panels, the specifications serve as the customers' requests for the product to the lighting fixture manufacturer. What the purchaser may receive will also depend upon whether the mark used to identify the product of the customer's choice confuses the fixture manufacturer who supplies the goods. It is consequently probative of confusion to analyze whether such fixture manufacturers have been actually confused on occasion.

The executive vice-president of Lighting Products, Inc. testified that if he saw a symbol, such as C-12, in a specification he would be confused because he associates even the numeral 12 alone with K-S-H with respect to lighting panels. (Plf. Ex. 106, Glass Depn., pp. 15-16) This is the same situation, to this witness, as the number 70 identifying Corning and the number 6250 identifying Holophane. (Plf. Ex. 106, Glass Depn., p. 16) Other witnesses testified that they too would associate the numbers 70 and 6250 with the manufacturers Corning and Holophane, respectively. (R. 967-68; R. 831; R. 504) The use of the same number with the letter C created confusion in the mind of the purchaser.

Numerous misdirected orders were shown to have been received by plaintiff's sales representative and also by Carolite. An order was received by Plastic Specialties from Freeman & Son, Ltd. in Canada requesting both "K8A" and "C12-5" panels on the same document. (Plf. Ex. 48) Carolite received seven orders from Nu-Lite

Manufacturing Company requesting a panel with one of plaintiff's trade symbols. (R. 436; Plf. Exs. 75, 76 and 77) In other orders from this fixture manufacturer a "K" was initially written and a "C" superimposed thereon. (Plf. Exs. 75, 78, 79 and 80) Orders were also received by Carolite from Wellmade Metal Products Co. in which a "K" was originally used and a "C" was later written over the "K". (Plf. Ex. 74) There is no evidence that Carolite sent such orders back but rather filled them and, in some cases, changed the "K" to "C" or had these letters changed by the customer. (R. 997-98)

A letter was received by Carolite from Midwest Chandelier instructing Carolite to change the size of the "K-5" panels supplied by Carolite. (Plf. Ex. 81) A misdirected order from Smoot-Holman, another fixture manufacturer, was received by Carolite for a "K-12" panel. (Plf. Ex. 82) "K-11" panels were ordered from Carolite by the Sechrist Company in Denver, Colorado. (Plf. Ex. 83)

Two orders and one release were sent by Globe Illumination Company to Plastic Specialties (the exclusive distributor of Plaintiff on the West Coast), ordering or referring to C-12 panels. (Plf. Exs. 42, 43 and 45) Another order sent to Plastic Specialties by Globe was a confirmation of an oral telephone order previously sent to Carolite. (Plf. Ex. 44) Six orders were also sent by Globe to Carolite requesting panels with plaintiff's trade symbols (Plf. Exs. 84 through 89) On two of these orders both plaintiff's and Carolite's panels were ordered (Plf. Exs. 88 and 89) One witness was queried as to why his company would send an order to Carolite with one of plaintiff's trade symbols and an order to plaintiff with one of Carolite's trade symbols. He replied that it was "an error in processing." (R. 919-920) The Court noted

that on one order to Plastic Specialties, C-12 was ordered and on another K-12 (Plf. Exs. 44 and 45) and then inquired:

“Now, what is the difference?

The Witness: Then we would—of course, on any purchase order we would endeavor to get the correct catalog number from its manufacturer on the purchase order.

The Court: C-12 is a Carolite order?

The Witness: Yes.

The Court: Why would you give a Carolite to K-S-H?

The Witness: It would be in our processing of the purchase order.” (R. 920)

These “errors in processing” are precisely due to the confusing similarity of the symbols used by plaintiff and Carolite. They are the manifestation of confusion as to which product is made by a particular company. It is apparent that if Carolite’s symbols were more distinguishable from those previously used by plaintiff that this confusion would not have resulted since Carolite’s marks would have more clearly indicated source.

The numerous mis-directed orders from various fixture manufacturers show the confusion caused by the similarity in the parties’ marks. Since the ultimate purchaser intends to receive panels manufactured by plaintiff when the specification calls for K-4, K-5, K-11 or K-12 panels, the confusion of the fixture manufacturer as to the source indicated by these symbols is significant. While the local Los Angeles fixture manufacturers are not confused by the parties’ businesses, they must be confused as to the product source, as shown by the mis-directed orders. On the other hand, the lighting engineers are confused as to the businesses as well as products. Carolite, therefore,

passes off its goods and business as that of plaintiff by using the confusingly similar trade symbols.

2. The Use of Similar Catalogs and The Same Testing Laboratory Was Part of Carolite's Overall Scheme And Shows Its Intent To Confuse Purchasers

Plaintiff introduced a three-ring looseleaf type catalog (Plf. Ex. 4) in early 1963 and nearly ten thousand copies have been distributed. (R. 97) These catalogs are supplied to architects and electrical engineers primarily by plaintiff's sales representatives throughout the country. These specifiers generally have a library of manufacturer catalogs including those from lighting fixture manufacturers and lighting panel companies. In preparing a specification, the selection of building components is aided by the information provided as to the performance characteristics and aesthetic appearance of the products to be used.

Plaintiff's catalog, while certainly not original in its mechanical features or design, was unlike the brochure type catalogs it had previously used and other lighting panel manufacturers other than Carolite continue to use. It also was distinctive in the provision of extensive technical information, particularly the performance testing laboratory reports which followed each panel configuration description page. (Plf. Ex. 4)

Carolite began to use a three-ring looseleaf catalog in late 1964. (R. 427) The catalog was prepared and designed by the president of Carolite, Inc. in collaboration with an independent designer having the K-S-H catalog before them. (R. 427, 429) This catalog also contains a description page for each lighting panel pattern followed by testing laboratory reports. (Plf. Ex. 73) The organiza-

tion of Carolite's catalog was admitted to be identical to plaintiff's. (R. 429) The Carolite catalog has four main sections designated consecutively C-4, C-55, C-11 and C-12. (Plf. Ex. 73) This series is identical to that in plaintiff's catalog notwithstanding that Carolite's panels were not chronologically introduced in that order and that the series is not numerically successive, *i.e.* C-55 is not last (and C-1 is in the back of the catalog). (R. 432; Plf. Ex. 73)

The testing laboratory which plaintiff began to use just prior to the time its new marketing program was launched was Independent Laboratories, Inc. of Boulder, Colorado. (R. 94) This laboratory tests plaintiff's lighting panels and prepares reports representing the photometric characteristics of the lenses. Subsequently, Carolite also began to use the same testing laboratory and obtained tests the results of which are presented on the same format report pages. (Plf. Ex. 73) The tests were run in the same lighting fixture used for plaintiff's tests, which was supplied to the laboratory by plaintiff. (R. 407-08) Carolite was interested in using test reports for a comparable test under the same conditions as plaintiff's tests but not those of any other company. (R. 413, 414-15) In correspondence between Carolite and Independent Testing Laboratories, K-S-H, its products and tests were frequently discussed. (Plf. Exs. 64-72)

A special type of performance criteria, called a "scissors curve," is set forth on a separate test report page in plaintiff's catalog for its most recently introduced panels, K-11 and K-12. (Plf. Ex. 4) These scissors curve test reports are also used by Carolite, and only for the C-11 and C-12 panels though chronologically the C-4 panel was the last type panel to be manufactured and sold by Carolite. (Plf. Ex. 73 and 3, Stip. Para. 13) Moreover,

while the test report formats were standard from Independent Testing Laboratories, Inc. (Plf. Ex. 103) plaintiff modified the report pages to include a diagram and a maximum brightness table. (R. 96; Plf. Ex. 4) Carolite made *identical* modifications to their reports to include the same diagram and table. (R. 431; Plf. Ex. 73) Furthermore, plaintiff received two sheets for each test report but printed the data on reverse sides of the same page for their catalog. (Plf. Ex. 4) Carolite did the same. (Plf. Ex. 73) To show the thoroughness with which Carolite copied plaintiff, they changed the test conditions (lumen rating) for their reports as plaintiff changed its test conditions. (Plf. Ex. 4 and 73; R. 423-24)

Plaintiff wishes to make clear that it makes no charge in the present case of copyright infringement; nor does plaintiff assert that it has the exclusive right against the whole world to use a catalog designed and organized like its catalog. Nor does plaintiff contend that no competitor may deal with Independent Testing Laboratories, Inc. What plaintiff *does* assert, and what the above evidence fully supports, is that these acts by Carolite show its *intent* to create confusion among purchasers. This intent colors the acts of Carolite, demonstrating that it attempted, and unfortunately succeeded in deceiving prospective customers into believing that Carolite was K-Lite.

The motives of Carolite's acts cannot be explained on any grounds other than the desire to deceive. Of course, Carolite wished to promote their products by showing the performance comparable to plaintiff's panels which had already received approbation by the trade. But was it necessary to use the same type of catalog, having similar trade symbols, identical organization and format even to the point of modifying standard test reports

so as to be identical to those used by plaintiff? Why is it that other competitors such as Sheffield Plastics Company, could use entirely different catalogs (Plf. Ex. 40) and yet compete successfully? And why was Carolite not interested in presenting its technical data so as to be comparable to other lighting panel manufacturers?

There is no rationale which will explain this sedulous imitation of plaintiff's marketing practices other than the purposeful intent to confuse prospective consumers and to supply the products for substitution. The catalog used by Carolite was one facet of a complete scheme to create confusion in the marketplace. And as previously indicated, the likelihood of confusion must be tested in light of the *intentional* acts of Carolite to cause deception; their familiarity with the market indicates that their opinion as to what may cause confusion should be given considerable weight. *National Lead Company v. Wolfe*, 223 F.2d 195 (CA 9 1955); *My-T-Fine Corporation v. Samuels*, 69 F.2d 76 (CA 2 1934). As recently stated in *Fleischmann Distilling Corp. v. Maier Brewing Company*, 314 F.2d 149, 158 (CA 9 1963):

"But when the evidence does show or require the inference that another's name was adopted deliberately with a view to obtain some advantage from the good will, good name, and good trade which another has built up, then the inference of likelihood of confusion is readily drawn, for the very act of the adopter has indicated that he expects confusion and resultant profit. *American Chicle Co. v. Topps Chewing Gum*, 2 Cir., 208 F.2d 560, 562; *Miles Shoes, Inc. v. R. H. Macy & Co.*, 2 Cir., 199 F.2d 602, 603; *National Van Lines v. Dean*, 9 Cir., 237 F.2d 688, 692. As was said in the last cited case: '[I]f such an intent is shown, it raises a presumption that deception and confusion resulted.'"

3. Advertisement of Products That Carolite Was Unable to Supply Manifests Its Unscrupulous Intent to Simulate Plaintiff's Business and Cause Confusion

Although Carolite copied plaintiff's lighting panel patterns, used similar identifying symbols and words and distributed similar catalogs, plaintiff did not remain stagnant in its product development. Plaintiff introduced lighting panels which were Tedlar coated to improve the discoloration quality and advertised this improvement in trade journals in December, 1964. (R. 1172-73) Since this new product distinguished plaintiff's product line from that of Carolite, again, Carolite felt that it was necessary to re-establish the total simulation program it had adopted. In February, 1955, Carolite began to advertise that Tedlar coated panels were "immediately available" (Plf. Ex. 102) when in fact Carolite had not received any commercial quantities of the Tedlar film until May, 1965. (R. 461-62) Thus, in its attempt to maintain the confusion between products and business, Carolite was willing to advertise products that it could not deliver. And in his deposition testimony, Mr. Wellen, president of Carolite, stated that he did not advertise Tedlar until July, 1965 (Plf. Ex. 101) when this was in fact false as shown by Plaintiff's Exhibit 102. (R. 462-65)

Again, plaintiff does not contend that Carolite could not copy plaintiff's new product development since it was unprotected by patent. But Carolite's copying was not simply the manufacture of an identical product, it was the manner in which it *marketed* this copied idea. It was not content to simply follow in plaintiff's footsteps. It insisted upon taking steps to create an illusion in the trade that the companies were the same with the same product lines. And it did so with such zeal that

it was even willing to advertise with blatant prevarications. Carolite intended to confuse specifiers so that when they desired to buy a specific panel from a particular manufacturer which they had previously used with satisfaction they could not remember—Carolite or K-Lite—C-12 or K-12. It therefore was necessary for Carolite to immediately dissipate any distinction between the products offered by the two companies. Even if they could not supply the product, the confusion must be preserved. Integrity was subservient to simulation. The intent to compete through unfair marketing practices is again manifested.

4. The Lower Court Erred In Finding That There Is No Likelihood of Confusion Between The Marks of the Parties And No Unfair Competition

It is submitted that the above-discussed evidence overwhelmingly proves that Carolite's conduct, primarily the use of C-4, C-55, C-11 and C-12, caused actual confusion and is likely to cause further confusion. The irresistible question—Why did the lower court rule in Carolite's favor?—must be answered.

The individual acts of Carolite other than the use of C-4, C-55, C-11 and C-12, considered alone, do not necessarily constitute unfair competition. Singular instances of conduct often show no more than bare coincidence. Plaintiff would not feel aggrieved if Carolite had only used the same testing laboratory, or the same engraver, or a similar catalog, or manufactured panels which were indistinguishable from those of plaintiff. Any one of these acts could be a reasonable competitive business decision. But *all* of these acts can only show an *intent* to appropriate plaintiff's good will. The principal vehicle for carrying out the plan was the use of the confusingly

similar Carolite trade symbols. Consequently, plaintiff sought relief from this unfair trade practice knowing that without this constituent, the entire predatory plan must fail.

The lower court, however, refused to view the acts of Carolite as conjoined and coordinate. Because copying of product appearance was legal, the court ignored the effect of this part of the scheme on the entire result. This was egregious error, since it is a cardinal principle of unfair competition and trade mark law that likelihood of confusion is dependent upon the goods on which the marks were used. In *Fleischmann Distilling Corp. v. Maier Brewing Company*, 314 F.2d 149 (9th Cir. 1963) this Court discussed at length the question of the relationship of the goods involved to likelihood of confusion. It was held that goods need not have the same descriptive properties to cause confusion. A logical corollary to this rule is that where the goods of both parties are lighting panels that are *indistinguishable* in appearance, then confusion is much more likely to occur. Actual deception has taken place and the likelihood of confusion continues to subsist.

Moreover, the lower court dismissed the similarity of the trade catalogs as a portion of the plan when informed that no copyright was asserted by plaintiff. This was also error because it resulted in a comparison of the marks in a non-realistic market environment. The law is clear that a naked comparison of marks is improper where the actual market-place conditions can be shown and extrinsic factors considered. *Miles Laboratories, Inc. v. Frolich*, 195 F.Supp. 256 (S.D.Cal.), aff'd, 296 F.2d 740 (9th Cir. 1961).

In the present case, the products of the parties are not generally sold over the counter but are rather selected

by specifiers from trade catalogs retained in their offices. The primary sales tool for vending lighting panels is these trade catalogs. Just as the labels on goods sold over the counter, on which trademarks are printed, may increase or lessen the possibility of confusion, the trade catalogs in this case may aggravate or mitigate purchaser deception. Thus, the catalogs are an integral part of the parties' sales activity and the similarity of the Carolite catalog contributed to the confusion.

Similarly, the use of the same testing laboratory and engraver demonstrated Carolite's *mala fides* in the adoption of the trade symbols C-4, C-55, C-11 and C-12. While it is unnecessary to establish intent to prove unfair competition, a showing of bad intent will raise a presumption that confusion resulted. *National Van Lines v. Dean*, 237 F.2d 688, 692 (9th Cir. 1956). We submit that use of the same testing laboratory to obtain test reports on a format identical to that previously used by plaintiff cannot be explained except as an attempt to heighten confusion. Procuring engraving rolls from the same source is also indicative of Carolite's plan to create perfect similitude between the parties' businesses and products.

Finally, even if the lower court did use the correct legal standard for determining unfair competition, it erred by misapplying the test to the facts in the case. This Court has held, however, that the question of likelihood of confusion is one for it to decide. *Fleischmann Distilling Corp. v. Maier Brewing Company*, 314 F.2d 149, 152 (9th Cir. 1963); *Sleeper Lounge Company v. Bell Manufacturing Co.*, 253 F.2d 720, 723 (9th Cir. 1958). On the present record, it is urged that this Court reverse the lower court's finding that there is no likelihood of confusion between plaintiff's trade symbols K-

4, K-5, K-11 and K-12 and Carolite's trade symbols C-4, C-55, C-11 and C-12.

B. Carolite Has Infringed Plaintiff's Valid Federally Registered Trademark K-LITE By Use Of The Mark CAROLITE On Identical Goods Sold To The Same Class Of Customers Through The Same Channels of Trade

Plaintiff began using the trademark K-Lite in 1958 and has used it continuously on a line of plastic prismatic lighting panels. (Plf. Ex. 3, Stip. para. 8) Plaintiff registered its trademark K-Lite under the Federal Trademark Act of 1946, 15 U.S.C. Sec. 1051, et.seq., on the Principal Register, as Registration No. 687,973, issued November 10, 1959. (Plf. Ex. 2) This registration is presently in full force and effect and is conclusive evidence of plaintiff's exclusive right to use this mark as provided in 15 U.S.C. Sec. 1065. (Finding of Fact No. 10, Vol. II, R.41)

Plaintiff has used this trademark extensively in its advertising and promotion and applies the mark to the goods and the containers in which the goods are shipped. (Plf. Exs. 4, 11-23, 28 and 182) These products are sold to lighting fixture manufacturers and ultimately to building owners through architects and electrical engineers who specify the panels as agents for the owners. (Plf. Ex. 24)

Defendant, J. W. Carroll & Sons, adopted and began to use the trademark Carolite in April, 1963 in connection with the sale of plastic prismatic lighting panels. Thereafter, principals of the defendant, J. W. Carroll & Sons, formed the defendant corporation, Carolite, Inc., which has also used the mark Carolite since August, 1964. (Plf. Ex. 3, Stip. para. 10) The trademark is employed by Carolite in a logotype wherein the letters "c-a-r-o" are placed

within a large "C" so that the visual appearance is a large C with the letters "l-i-t-e." (Plf. Exs. 53, 73, 101 and 102; Def. Exs. AG through AI) The prismatic lighting panels on which the mark Carolite is used are identical in appearance to the panels made and sold by plaintiff. (R. 388-389) These goods are sold to the *same class of customers* through the *same channels of distribution*.

It is not necessary in a registered trademark infringement action to show actual specific instances of confusion since the test is likelihood of confusion. 15 U.S.C.A. Sec. 1114(i); *Fleischmann Distilling Corp. v. Maier Brewing, Co.*, 314 F.2d 149 (9th Cir.), cert. denied, 374 U.S. 830 83 S.Ct. 1870 (1963); *Miles Laboratories, Inc. v. Frolich*, 195 F.Supp. 256 (S.D.Cal 1961), aff'd, 296 F.2d 740 (9th Cir.), cert. denied, 369 U.S. 865, 82 S.Ct. 1030 (1962); *Sunbeam Corp. v. Sunbeam Furniture Corp.*, 88 F.Supp. 852 (S.D.Cal. 1950), modified, 191 F.2d 141 (9th Cir. 1961). The likelihood of confusion test includes consideration of the similarity of the marks, *Sleeper Lounge Company v. Bell Manufacturing Co.*, 253 R.2d 720 (9th Cir. 1958), the class of goods to which the marks are applied, *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 314 F.2d 149 (9th Cir. 1963), the marketing channels through which the goods are sold and the intent of defendant in adopting the mark. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, *supra*.

Since the goods of the parties in this case are *identical* in appearance and the customers are the same, the likelihood of confusion is increased. Two questions remain: (1) the confusing similarity of the marks *per se*; and (2) the intent of defendants in adopting this mark. The latter issue is more fully discussed in the preceding sections of this Brief, since Carolite's conduct which evidences its intent includes its use of other trade symbols,

advertising and promotion and its efforts to aggravate confusion.

The question of confusing similarity of these marks should be resolved on the sound, appearance and meaning of the words. *Sleeper Lounge Co. v. Bell Mfg. Co.*, 253 F.2d 720 (9th Cir. 1958) Moreover, the marks must be considered in their entireties, i.e. no portion of the trademarks should be ignored in considering similarity. *Sleeper Lounge Co. v. Bell Mfg. Co., supra*; *Van Camp Sea Food Co. v. Westgate Sea Products Co.*, 28 F.2d 957 (9th Cir. 1928) Although Carolite had alleged that the suffix "Lite" is commonly used in the lighting industry, there was not a scintilla of evidence to sustain this assertion. The marks, of course, have identical suffixes which contribute to the oral and visual confusing similarity. This suffix also aids in the confusion since it gives the marks the same suggestive meaning.

It is well-settled that the test of similarity of the two marks is not whether a purchaser may be confused with the two marks placed side by side, but is whether a person exposed to plaintiff's mark would have a recollection thereof that would cause him to be misled on subsequent contact with the latecomer's mark. *Brooks v. Great Atlantic & Pacific Tea Co.*, 92 F.2d 794 (9th Cir. 1937); *Keller Products v. Linings Corp.*, 213 F.2d 382 (7th Cir. 1954).

Carolite has raised the entirely spurious defense that because the mark CAROLITE includes a portion of one or several of the shareholders' and officers' surnames they cannot be denied use of this name. The law, however, is *explicitly* to the contrary. In *Everest & Jennings, Inc. v. E. & J. Mfg. Co.*, 263 F.2d 254 (9th Cir. 1958), *cert. denied*, 360 U.S. 902, 79 S.Ct. 1284 (1959), defendants raised the same defense and the Court stated, at page 259:

"The mere fact that a corporation is using the name of one of its shareholders does not confer the same rights the shareholder might have to the use of his own name. The fact that the defendant's corporate name includes the name Jennings, which is the name of a shareholder and an officer in the corporation is without significance in this case."

Moreover, plaintiff does not contend that Carolite should be precluded from using the tradename J. W. Carroll & Sons; the confusion emanates from the mark CAROLITE which is *not* the surname of any of the shareholders. And, in any event, no one has an *absolute* right to use of their surname. See, *e.g.*, *MacSweeney Enterprises, Inc. v. Tarantino*, 106 Cal.App. 2d 504, 235 P.2d 266 (1951); *Jackman v. Mau*, 78 Cal.App. 2d 234, 177 P.2d 599 (1947).

The type of goods, the class of potential customers, the use of CAROLITE, the public recognition of plaintiff's trademark prior to the time the latecomer introduced his mark, and the competitive relationship between the parties are also factors to be considered in determining if likelihood of confusion exists. 3 Callman, *Unfair Competition and Trade-Marks*, Sec. 80.5 (2d ed 1950). In the present case, the goods and class of customers are identical. The parties are in direct competition and plaintiff's mark K-LITE was well-known for many years (prior to Carolite's adoption of the mark CAROLITE in April, 1963) through extensive advertising and promotion. And as shown in discussing the use of the trade symbols K-4, K-5, K-11 and K-12, the intent of Carolite was to appropriate the goodwill established by plaintiff in the similar mark K-Lite. The likelihood of confusion conclusively establishes that plaintiff's registered trademark is infringed.

C. Carolite Has Unfairly Competed With Plaintiff By Aiding And Abetting The Palming Off By Lighting Fixture Manufacturers of Carolite's Lighting Panels As Those Of Plaintiff

The lighting panels manufactured by Carolite are identical in appearance to those made and sold by plaintiff and bear no marking to indicate source. (R.465-66) With the naked eye, no one is able to distinguish between the panels of the two parties, except the C-11 panel which defendants' witness stated was visibly inferior. (R.966) Since plaintiff's panels are not protected by patent or copyright, Carolite was free to make these Chinese copies. *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 84 S.Ct. 784 (1964). The Supreme Court pointed out in the *Sears* case, however, that a state may require that labeling or other precautionary steps be taken to prevent customers from being misled as to source. *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. at 232. And in *Compeo Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 84 S.Ct. 779 (1964), it was stated at page 238:

“A State of course has power to impose liability upon those who, knowing that the public is relying upon an original manufacturer's reputation for quality and integrity, deceive the public by palming off their copies as the original.”

The law with respect to palming off, therefore, has not been altered by these decisions except that it is clear that it cannot be shown that the public desired a product of one manufacturer because the product itself identifies that manufacturer. Plaintiff here asserts that when its goods are desired by purchasers they are identified by the symbols K-4, K-5, K-11 and K-12 and not by the appearance of the panels. The *Sears* and *Compeo*

ases promoted free competition by allowing copying in manufacturing, but protected the public by prohibiting unfair marketing.

In the present case, the actual palming off takes place between the fixture manufacturer and the public *qua* specifiers. There is no charge herein that the fixture manufacturers have goods palmed off on them by Carolite. Carolite liability is predicated upon its enabling these fixture manufacturers to palm off goods on the purchasers.

It cannot be gainsaid that unless fixture manufacturers ave in fact palmed off Carolite's goods as those of plaintiff, it cannot be held liable. The record fully supports the conclusion that actual palming off has occurred. The palming off takes place in two ways: (1) when specifiers request plaintiff's goods identified by the symbols K-4, K-5, K-11 and K-12 alone; and (2) when specifiers demand plaintiff's goods identified by these trade symbols together with the name K-Lite. There is abundant evidence that when the trade symbols alone are used, Carolite panels are palmed off by Sunbeam Lighting Company (R.603-05), Globe Illumination Company (R.955-56), Nu-Lite Fluorescent Manufacturing Company (R.986) and Acme Lighting and Manufacturing Company (R.1021-22).

With respect to specifications in which K-4, K-5, K-11 or K-12 are used together with K-S-H to identify the lighting panels, the lower court found Carolite guilty of aiding and abetting palming off by Sunbeam. (Finding of Fact No. 16, Vol. II, R. 44; Conclusion of Law VI, Vol. II, R.46) It entered an appropriate judgment order enjoining Carolite from this type of unfair competition. (Judgment Order, para. 1, Vol. II, R. 49). The only issue before the Court on this appeal (since Caro-

lite did not cross-appeal), is whether Carolite is also guilty of contributory palming off where the specification identified the panels with one of the symbols K-4, K-5, K-11 or K-12, alone.

1. A Person Is Guilty of Unfair Competition Where He Enables A Dealer Or Retailer To Palm Off Goods Where The Goods Of Another Are Requested

The law with respect to aiding and abetting palming off is summarized in *William R. Warner & Co. v. Eli Lilly Co.*, 265 U.S. 526, 530, 44 S.Ct. 615, 617 (1924):

“That no deception was practiced on the retail dealers, and that they knew exactly what they were getting, is of no consequence. The wrong was in designedly enabling the dealers to palm off the preparation as that of the [Plaintiff].”

Recognition that the law is concerned with the ultimate purchaser, as well as the dealers or retailers, and therefore proscribes the aiding and abetting of palming off is well established in the Ninth Circuit. *Ross-Whitney Corp. v. Smith, Kline & French Lab.*, 207 F.2d 190 (9th Cir. 1953); *Haeger Potteries v. Gilner Potteries*, 123 F.Supp. 261 (S.D.Cal. 1954). The state law of California in this regard is also settled. It was stated in *American Philatelic Society v. Claibourne*, 46 P.2d 135, 139, 3 Cal. 2d 689, 698 (1935) as follows:

“So, likewise, it is immaterial to the charge of unfair competition that the [Defendant] made no attempt to deceive the retail dealers and in fact frankly stated to them the true facts, that the stamps were unofficially separated. There is an abundance of cases recognizing and setting forth the well-settled rule that it is of no consequence in a charge of unfair competition that no deception is practiced on the retail dealers and they know exactly what

they are getting; that the wrong lies in designedly enabling the dealer to palm off the copy or simulated article as that of the complainant."

These cases establish that a person whose products are identical to that of an originator assumes the duty to take reasonable steps to prevent any palming off. The recent case of *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 84 S.Ct. 784 (1964) has not relieved the copier of this duty, but rather has created the environment for its increased application. The *Sears* case involved one problem, the right to *manufacture* goods identical to those of another where no patent or copyright existed. Assurance that the purchaser would receive the goods from the manufacturer it desired was a problem involving the *marketing* of the identical goods which remained for the states to protect. *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. at 232. This distinction between the rights of a person in manufacturing and in marketing identical copies of a product originated by another has been long recognized. *Upjohn v. Schwartz*, 246 F.2d 254 (2d Cir. 1957); *Zangerle & Peterson Co. v. Venice Furn. Novelty Mfg. Co.*, 133 F.2d 266 (7th Cir. 1943).

Passing the question of what affirmative duties may rest on a copier, the above cases clearly show that defendants compete unfairly if they enable others to palm off their goods and know or participate in such palming off. One situation is illustrated in the case of *Ross-Whitney Corp. v. Smith, Kline & French Lab.*, *supra*, wherein the copier advertised to dealers that they could substitute and showed the dealers the identical copies to assure them that there would not be detection. In *William R. Warner & Co. v. Eli Lilly Co.*, *supra*, there was some evidence that defendant's salesmen suggested the feasibility of substitution without detection. In both

cases, the courts gave particular attention to the inducement which inhered in the lower price of defendant's products which could yield a larger profit to the dealer. And, see, *Smith, Kline & French Laboratories v. Clark & Clark*, 157 F.2d 725 (3d Cir. 1946).

Since a manufacturer cannot absolutely guarantee that an unethical dealer will not substitute goods, the courts have arrived at a test of whether wrongdoing by a dealer "might well have been anticipated by the defendant." *Reid, Murdoch & Co. v. H. P. Coffee Co.*, 48 F.2d 817, 819 (8th Cir. 1931). Accord, *New England Awl & Needle & Co. v. Marlborough Co.*, 168 Mass. 154, N.E. 286 (1897) (Holmes, J.); *Rice & Hutchins v. Vera Shoe Co.*, 290 Fed. 124 (2d Cir. 1923).

The test was also stated by Judge Wazanski in *Coca-Cola Co. v. Snow Crest Beverages*, 64 F.Supp. 980, 989 (D.Mass. 1946) as follows:

"Where the defendant markets a product, defendant's accountability for his customer's wrongful use of that product turns on the issue whether a reasonable person in the defendant's position would realize either that he himself had created a situation which afforded a temptation to or an opportunity for wrong by l'homme moyen sensuel or was dealing with a customer whom he should know would be peculiarly likely to use the defendant's product wrongfully."

And in *Sylvania Electric Products v. Dura Electric Lamp Co.*, 144 F.Supp. 112, 125 (D.N.J. 1956) liability was predicated upon whether the defendant "authorized, expected intended or knew that its product would be sold as" that of plaintiff.

Thus, the law requires that it be shown that Carolite knew, or as a reasonable man should have known, that

dealers would palm off their goods as those of plaintiff since Carolite enabled such palming off. Where it can be additionally shown that Carolite suggested, insinuated or induced the palming off, liability follows as a matter of course.

2. Carolite Knew Or At Least Should Have Known That Several Local Fixture Manufacturers Were Palming Off Its Panels As Those of Plaintiff And On Several Occasions Suggested The Feasibility Thereof

After commencing manufacture of lighting panels identical in appearance to those of plaintiff, Carolite set out to capture a portion of the market. It did not choose to do this by creating a demand for its own products through advertisement and promotion. In fact, it has placed only two advertisements in trade publications. (Plf. Exs. 101 and 102) The catalogs it has distributed and the symbols it used to identify its manufacture were not distinctive to call attention to a new source. It did not mark its panels as to source. (R.465-66) But further, Carolite suggested to fixture manufacturers the possibility of substitution of its panels as those of plaintiff without detection.

Carolite made a point to call attention to the fact that its panels were "equivalent" to those of plaintiff. (Plf. Exs. 92, 93 and 97) In a letter of December 14, 1964, Carolite's president pointed out that its panels compared favorably with those of K-S-H- and that "there should be no trouble with any specification or on an 'or equal' basis." (Plf. Ex. 95, letter dated Dec. 14, 1964) Although reference to an "or equal" specification suggests that the fixture manufacturer would be able to obtain approval, the suggestion that "any specification" could be met insinuates that authorization is unnecessary since the

substitution would not be detected. Moreover, in a letter of April 3, 1964, Carolite indicated to the same manufacturer how it intended to use the fact that they procured their embossing rolls from the same engraver as plaintiff used. ((Plf. Ex. 95) In this letter, it was stated that since the embossing rolls were from the same source as K-S-H used, the panels "will be an exact duplicate and therefore, perform identically." (Plf. Ex. 95) Again, it can be seen that an act wholly legal and innocent in itself—procurement from the same source as a competitor—can be used in a marketing scheme to suggest unauthorized substitution.

As an inducement to fixture manufacturers, Carolite made comparison to a price advantage over K-S-H. (Plf. Exs. 94 and 95) Since fixture manufacturers which intended to comply with the specification would base their bid on K-S-H prices, there was a suggested opportunity to devious fixture manufacturers to substitute Carolite panels and either outbid other fixture makers or obtain a handsome profit.

Carolite also received orders which should have indicated to it that unapproved substitutions were being perpetrated. For example, an order from Sechrist Manufacturing Company called for C-55 panels supplied by Carolite in containers marked "K-5". (Plf. Ex. 91) Why else would a fixture manufacturer want to mark the cartons K-5, and not C-55, unless it wanted to substitute without approval? Carolite also shipped lighting panels in plain cartons whereby the manufacturer would not be disclosed. (R.442; R.558-61) On one occasion, the president and vice-president of Carolite specifically told an employee that *the reason for using plain cartons was to prevent identification of the manufacturer.* (R. 558-59) There was no explanation given at trial of why plain cartons were used, but the motive is obvious.

These acts of Carolite must be considered with the fact that several local fixture manufacturers, representatives of which testified on behalf of Sunbeam, stated that they obtained no approval for a substitution if the specification called for a panel with K-4, K-5, K-11 or K-12 alone. (R.955-56; R.986; R.1021-22) Carolite knew, or should have known, that these unapproved substitutions were taking place. Of course, Carolite also knew that Sunbeam was substituting without approval on specifications using one of the symbols K-4, K-5, K-11 or K-12 alone. (R.603-04) In fact, Carolite has not attempted to deny this knowledge, but has erroneously pleaded avoidance on the ground that this conduct was permissible because plaintiff's trade symbols were pattern designations only. As the above specific acts show, Carolite did not attempt to discourage this palming off but rather aided this wrongful conduct through suggestion, inducement and even participation.

The applicable standard of law is whether Carolite knew, expected, intended or should have realized that it created the opportunity for palming off by the lighting fixture manufacturers. The above evidence establishes that Carolite knew of the unauthorized substitutions and encouraged such unfair competition. The mere fact that Carolite was not personally informed by the fixture manufacturers each time they substituted without approval on a specification using one of plaintiffs trade symbols alone did not exculpate Carolite. It would have been a simple matter for Carolite to mark each of its panels, as did plaintiff, with a source identifying symbol. In that event, Carolite could have manufactured and sold indistinguishable panels. Since they could not induce or even reasonably expect the fixture manufacturers to palm off marked panels, they would have been relieved from liability if such palming off occurred.

We submit that in properly reversing the lower court and holding that K-4, K-5, K-11 and K-12 are trademarks, it will inexorably follow that the lower court should be reversed and Carolite found guilty of contributory palming off.

CONCLUSION

The trade symbols K-4, K-5, K-11 and K-12 identify lighting panels made only by plaintiff and plaintiff has the exclusive right to the use of these symbols. By the subsequent adoption of the symbols C-4, C-55, C-11 and C-12, Carolite has created a likelihood of confusion. Moreover, Carolite has perpetrated other acts as part of an overall scheme to appropriate plaintiff's good will.

The mark CAROLITE used on identical appearing lighting panels sold to the same class of customers through the same channels of trade is an infringement of plaintiff's valid registered trademark K-LITE.

Carolite is guilty of unfair competition by contributory palming off of Carolite panels where a customer specifies plaintiff's panels with one of the trade symbols K-4, K-5, K-11 or K-12, alone.

The judgment in favor of Carolite should be reversed.

Respectfully submitted,

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Chicago, Illinois 60602,
Attorneys for Appellant.

C E R T I F I C A T E

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

.....



APPENDIX



A P P E N D I X

	Plaintiff's Exhibit No.	Marked for Ident., Record Page No.	Received in Evid., Record Page No.
script			
trademark Reg. No. 639,495	1	13	14
E Trademark Reg. No. 687,973	2	14	14
tion of Facts;			
and Carolite	3	67	85
3-ring catalog			
green) of KSH	4	77	78
ey catalog of KSH			
) (thick)	5	77	79
ey brochure of KSH			
) (thin)	6	86	88
reen brochure of KSH	7	89	89
3 catalog page			
/black) of KSH	8	90	91
atalog page (gold/black) of KSH	9	90	91
atalog page (gold/black)			
SH	10	90	91
dvertisement page (K-11)	11	90	99
dvertisement page (K-12)	12	99	99
dvertisement page (K-Pans)	13	99	99
dvertisement page (Tedlar)	14	99	99
dvertisement page (Tedlar)	15	99	99
dvertisement page (K44)	16	99	99
dvertisement page (K33)	17	99	99
dvertisement page (Quality)	18	99	99
dvertisement page			
cification)	19	99	99
dvertisement page			
cification)	20	99	99
dvertisement page (Quality)	21	99	99

Document	Plaintiff's Exhibit No.	Marked for Ident., Record Page No.	Re Ev Re Pa
<u>Trial Transcript</u>			
KSH advertisement page (Quality)	22	99	
K-No. Lens Swatches on chain	23	100	
Specification Diagram	24	117	
Notice of Publication K-11	25	120	
Notice of Publication K-12	26	120	
Official Gazette TM p. 251	27	120	
K-5 lens sample with K-Lite marking	28	120	
Notice of infringement ltr 4/21/65	29	120	
Chart (West Coast) on sales	30	130	
Day Brite Buyer's Guide	31	102	
Columbia catalog (earlier than defendants)	32	104	
PALCO catalog	33	104	
Sunbeam Account Balance Sheet	34	202	
KSH Quotation dated 2/25/66 (9910)	35	202	
KSH Quotation dated 3/1/66 (9915)	36	202	
KSH Quotation dated 3/11/66 (9953)	37	202	
KSH Quotation dated 3/11/66 (1153)	38	202	
KSH Quotation dated 3/31/66 (10174)	39	202	
Sheffield Data File (blue)	40	202	
Sheffield Plastic Samples in box	41	202	
Globe letter 11/10/64	42	335	
Globe order #7192	43	335	
Globe order #7169	44	335	
Globe order #7291	45	335	
Invoice Nat'l Wholesale Elec. Co. G 11724	46	335	
Invoice Action #1161	47	335	
Freeman order No. 14615	48	335	
ESI Fixture Survey 2727 (Charter Oaks)	49	335	

— 3a —

	Plaintiff's Exhibit No.	Marked for Ident., Record Page No.	Received in Evid., Record Page No.
<u>nscript</u>			
xture Survey 2990			
1 Gypsum)	50	335	349
xture Survey 2627			
sen Hydraulic)	51	335	349
xture Survey 2696			
Trade Tech. College)	52	335	349
e sample lens on key chain	53	388	
7/62 Carroll to Roehlen	54	390	391
mple sent with 2/27/62			
(hexagonal)	55	390	391
3/62 Roehlen to Carroll	56	390	394
/63 Carroll to Roehlen	57	390	397
n invoice	57 A	390	397
mple sent with 6/3/63 ltr			
er)	58	390	397
2/3/64 Carroll to Roehlen	59	390	398
mple sent with 2/3/64 memo			
hond)	60	390	400
7/64 Carroll to Roehlen	61	390	401
9/64 Carroll to Roehlen	62	390	403
8/63 ITL to Carroll	63	406	408
/63 Carroll to ITL	64	406	411
0/63 ITL to Carroll	65	406	413
7/63 Carroll to ITL	66	406	414
1/63 Carroll to ITL	67	406	415
3/3/64 ITL to Carroll	68	406	419
3/5/64 Carroll to ITL	69	406	421
4/64 Carroll to ITL	70	406	422
7/64 Carroll to ITL	71	406	423
10/64 Carroll to ITL	72	406	424
st reports	72 A	406	425
e Catalog (gold vinyl cover)	73	406	427

Document	Plaintiff's Exhibit No.	Marked for Ident., Record Page No.	Re Ev Re Pa
<u>Trial Transcript</u>			
Wellmade Orders Nos. 6482, 5988, 6409 and Carolite invoices 0794 and 2061	74	417	
Nulite Orders Nos. 1704, 9719, 9732, 1820, 1833 and 0348	75	417	
Nulite Order 0183 and Carroll Inv. 0871	76	417	
Nulite Order 4485 and Carroll Inv. 0678	77	417	
Nulite Order 0362 and Carroll Inv. 00523	78	417	
Nulite Order 4356 and Carroll Inv. 0477	79	417	
Nulite Order 4376 and Carroll Inv. 0521	80	417	
Ltr 6/25/65 Butler to Carolite	81	417	
Smoot Holman Order No. 91430	82	417	
Sechrist Order 6/17/65 and Carolite Invoice 2344	83	417	
Globe Order 5241 and Carolite Invoice 1442	84	417	
Globe Order 5001 and Carolite Invoice 1201	85	417	
Globe Order 5031 and Carolite Invoice 1182	86	417	
Globe Order 4569 and Carolite Invoice 0717	87	417	
Globe Order 4493 and Carolite Invoice 0629	88	417	
Globe Order 4220	89	417	

Plaintiff's Exhibit No.	Marked for Ident., Record Page No.	Received in Evid., Record Page No.
nscript		
egel Order (10 sheets)	90	417
c Order 1/25/65	91	417
3/64 Carroll to hercial Reflector	92	444
ghouse correspondence (sheets)	93	444
e Plastic correspondence (sheets)	94	444
de correspondence (sheets)	95	444
4/64 Carroll to Day Brite ; 1/7/64 ltr ; 2nd page of	96	444
	97	444
7/64 Carroll to du Pont	98	444
9/65 Carroll to du Pont	99	444
for C-12 Tedlar	100	444
om July LIGHTING ad (lite)	101	444
ly 1965 LIGHTING ad (lite)	102	444
mple Scissor Curve Sheet	103	431
ters ; 9/25/63 Spensley rolite	104	444
tr contract K-D and JWC	105	444
A. Glass Deposition	106	566
Church Deposition	107	567
I. Evans Deposition	116	573
Deposition	117	573
g Fixture Specifications (sheets)	118	577
c Special Conditions stitution) (2 Sheets)	119	577

Document	Plaintiff's Exhibit No.	Marked for Ident., Record Page No.	Rec Evi Rec Pag
<u>Trial Transcript</u>			
Sunbeam Drawing 24553D "QK4A" (9/10/63)	120	577	
Sunbeam Drawing 24313 "QK4S" (6/13/63)	121	577	
Sunbeam Catalog Pages (2 Sheets)	122	577	
GE Invoice 34177B dated 6/23/64	123	577	
GE Invoice 41910B dated 10/26/64	124	577	
GE Invoice 48707B dated 3/3/65	125	577	
Sunbeam Memo 8/19/64 (3 Sheets)	126	577	
Hopper Truck Letter 8/10/64	127	577	
Letter 11/5/64, Kohnen to GE	128	577	
Letter 1/26/65, Lathen to GE	129	577	
Letter 2/22/65, Kohnen to GE (2 Sheets)	130	577	
Letter 3/11/65, Kohnen to GE	131	577	
Unmarked carton for replace- ment panels	132	577	
Photos of carbon	132 A	577	
Lens found in unmarked carton	133	577	
Howard PO 1046A (3 Sheets)	134	577	
GE Invoice 44411B dated 12/14/64	135	577	
Carolite Invoice 0665 dated 11/23/64	136	577	
Sunbeam PO 52869 dated 11/12/64	137	577	
Letter, dated 8/18/65, Matloff to Plastics Specialties	138	582	
Letter, dated 9/10/65, Plastic Specialties to Matloff	139	582	
Letter, dated 9/14/65, Matloff to Plastic Specialties	140	582	
Letter 9/23/65, Stahlhut to Matloff	141	582	

Plaintiff's Exhibit No.	Marked for Ident., Record Page No.	Received in Evid., Record Page No.
<u>script</u>		
Order 50593 (5/18/64)		
olite "K4 Acrylic"	142	585
oice 14164 (5/18/64)		
beam "K-4"	143	586
oice 14305 (5/29/64)		
beam "K-4"	144	586
Drawing 24553E		
63) "QK4A 3434-48RS"	145	587
r dated 11/16/64		
A3432"	146	592
rvey LM2-12862-C, Kaiser		
eets)	147	671
2/30/65, Lathraim to		
y, Sexton, and etc.	148	688
Order 2/7/64 (\$18.92)		
9541	149	743
Order 5/3/66	150	743
Deposition	151	760
h Deposition	152	760
s Affidavit	153	840
er 7739-29901D	154	881
swatch of		
Haas P-4	155	895
talog	156	911
ges from Sunbeam		
list with "Guarantee"	157	1106
Carroll Deposition	165	1132
arroll Deposition	166	1132
Carroll Deposition	167	1133
Tellen Deposition		
11/29/65	168	1135
Tellen Deposition		
1/25/65	169	1136

Document	Plaintiff's Exhibit No.	Marked for Ident., Record Page No.	Rec Evi Rec Page
<u>Trial Transcript</u>			
West Coast Lithograph Invoices dated 10/8/63 and 10/9/63 (C-55)	170	1137	
West Coast Lithograph Invoices 12/24/64 (C-12)	171	1137	
West Coast Lithograph Invoices dated 3/19/65 (C-12)	172	1137	
West Coast Lithograph Invoice dated 3/13/65 (C-12 Frameless)	173	1137	
West Coast Lithograph Invoices dated 3/23/65 (C-12)	174	1138	
West Coast Lithograph Invoices dated March 19, 1965 (C-11)	175	1138	
West Coast Lithograph Invoices dated 3/19/65 (C-11)	176	1138	
West Coast Lithograph Invoices dated 1/29/65 (C-4)	177	1138	
West Coast Lithograph Invoices dated 3/19/65 (C-4)	178	1139	
Wendell Vaughn Deposition	179	1139	
Herbert Krieger Deposition	180	1141	
Sol Matloff	181	1144	
KSH Box 1 x 4' Stamped with big K-12	182	1145	
Xerox copy of LC catalog with "21-" designations	183	1147	
Hobnail sample	184	1152	
K-Lux brochure	185	1153	
Honeycomb sample	186	1156	
Stahlhut article in 11/64 issue of Light and Lighting	187	1157	
Frameless sample of Carolite	188	1159	
Frameless sample of KSH	189	1159	

Plaintiff's Exhibit No.	Marked for Ident., Record Page No.	Received in Evid., Record Page No.
script		
fig. pattern sheet		
ination marks)	190	1163
ale brochure	191	1167
ale catalog	192	1167
e catalog	193	1170
Haas—Price List		
25, P-7	A	26
of Corning 70 Glass	B	28
tx sample	C	34
Catalog Sheet		
oge brochure)	D	34
Gain (only K-11 sample)	E	36
Gain (only K-12 sample)	F	39
iece of stamped Holsphane	G	40
back	H	45
back front (glass)	I	46
over KSH catalog (current)	J	49
over KSH catalog (Blue Green)	K	49
ry early KSH Catalog	L	49
ton Carolite from PS	M	144
ton Carolite from PS	N	144
n Carolite	O	144
n Carolite	P	144
n Carolite	Q	144
a Catalog	R	148
a Catalog Sheet	S 1	148
e Catalog	S 2	
a Catalog	R	161
a Catalog Sheet	S 1	163
e Catalog	S 2	163

Document	Plaintiff's Exhibit No.	Marked for Ident., Record Page No.	Rece Evid Rec Page
<u>Trial Transcript</u>			
Corning Catalog	T		
Sineo Catalog	U		
K-Lite Ford Ad with "K-5 pattern", no date	V	173	
K-Lite Place Villa ad with "K-5 pattern", no date	W		
K-Lite (Plas. Spec.) price list "Type K-2" (K-Lite pattern)	X		
Sunbeam Purchase Order 6/4/65 (Sacramento)	Y		
Luminous Ceiling brochure pages (Series B)	Z	267	
Luminous Ceiling brochure pages (Series V)	AA	267	
Luminous Ceiling brochure pages (Series R)	AB	272	
Luminous Ceiling brochure pages	AC	272	
Luminous Ceiling brochure pages	AD	272	
Acme Litg Catalog	AE	276	
Nat'l Order to Nulite (says only K-5, without "KSH")	AF	374	
Carolite Business Card	AG	476	
Carolite Envelopes	AH	472	
Carolite Invoice	AI	472	
JWC Invoice	AJ	472	
JWC Envelope and Letterhead	AK	472	
San Clemonte Elem. School	AL	697	
Taylor Elem. School	AM	697	
Coroneta Elem. School	AN	697	
Norco Elem. School	AO	697	
KSH Price List with "F Nos."	AP	722	
Sunbeam Photometric Chart for "K-11 pattern"	AQ	723	

Plaintiff's Exhibit No.	Marked for Ident., Record Page No.	Received in Evid., Record Page No.
script		
an Photometric Chart for PCXA"	AR	723
an Dwg with approval note		727
Trade job	AS	728
an Order dated 6/4/65		
25	AT	751
(TWX Sunbeam to KSH for release"	AU	753
os Affidavit	AV	847
ae card for Globe fix		
l pattern)	AW	921
s Dep'n	AX	940
u Dep'n (10/26/65)	AY	941
'ep'n	AZ	941
'ep'n	BA	942
s Dep'n	BB	943
pl Dep'n	BC	944
'ep'n	BD	944
nDep'n	BE	945
rr Dep'n (with exhibits)	BF	948
IBM 24RD	BG	1056
L-12-240-RS-AG-DF K-11 . .		
m as in catalog)	BH	1056
(PCXA 9204-48RS-118v		
VCK	BI	1060
on Illumination	BJ	1087
ael (Sunbeam 7400)	BK	1094
Answers to Sunbeam's		
interrogs	BL	1118
Afidavit in M/Prelim. Inj.	BM	1128
rDep'n	BN	1129
ron Kohnen Dep'n	BO	1129
s f Box	BP	1130

